BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The unreported oral opinion of the United States District Court for the Northern District of Texas, rendered in open court, prior to the rendering of the judgment in this Court, is shown in the Record at Pages 2147 to 2232. The opinion of the United States Circuit Court of Appeals, Fifth Circuit, rendered, on December 28, 1944, appears in the Record under separate cover prepared by the Clerk of the Circuit Court of Appeals for the Fifth Circuit.

GROUNDS ON WHICH JURISDICTION IS INVOKED

A statement of grounds of jurisdiction is contained in the petition. The judgment of the United States Circuit Court of Appeals reversed and remanded the case for further proceedings not inconsistent with their opinion. Such judgment of the Circuit Court of Appeals was entered on the 28th day of December, 1944, and is shown in the Supplemental Record. A petition for rehearing was filed and was overruled by the Circuit Court of Appeals on the 26th day of January, 1945, and appears in the Supplemental Record. After the motion for rehearing was overruled, Appellees filed an application before the Circuit Court of Appeals requesting such Court to recall its mandate and to permit the Appellees to have the record corrected to reflect the facts disclosed to them subsequent to such motion for rehearing, as to the

matters the Trial Judge referred to in his opinion, and to permit the Appellees to file a second motion for rehearing. This application was passed on and overruled by the Circuit Court of Appeals on the 10th day of April, 1945. Jurisdiction is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, c. 229, Section 1 (43 Stat. 938), (28 U.S.C.A. Section 347). It is contended that such opinion is in conflict with this court and other Circuit Courts of Appeals. In the case, Dooley v. Pease, 45 L. Ed. page 457, **Wilcox** v. **Stokes,** 73 Federal Reporter (2d) 868. **United States** v. **Peary,** 55 Federal (2d) 819; **White** vs. **United States,** 48 Fed. (2d) 178. **Pitcairn,** et al. vs. **Fisher,** 78 Federal (2d) 649. **United States** v. **Matory,** 71 Federal 798; Federal Rule No. 52, Federal Rule No. 61, Art. 391, Title 28 of the United States Judicial Code. Such opinion of the Circuit Court of Appeals being in conflict with each of the above authorities.

STATEMENT OF THE CASE

The statement of the case is, we think, fairly made in the foregoing petition, pages _____ to _____, and same will not be repeated here. We insist, however, that there was ample testimony, legal, relevant and competent, in the record to support the judgment of the Court and to disregard all illegal and irevelant matters that might have been presented by the Court and is so found by the dissenting opinion of Judge Sibley in this cause.

SPECIFICATIONS OF ERROR

I.

The Honorable Circuit Court of Appeals for the Fifth Circuit erred in reversing and remanding this case and in holding that the Appellant in this cause could take advantage of errors invited by them, and of acts and conduct, of the Trial Judge had and done in their presence, and with their knowledge, prior to rendering a judgment herein in which they took no exceptions and requested no correction by the Trial Court.

II.

The Circuit Court of Appeals erred in reversing and remanding this case and in thereby holding that the findings of fact of the Trial Court based upon legal, competent and relevant testimony was not binding upon them in violation of Section 391, Title 28, of the Judicial Code of the United States.

III.

That the Circuit Court of Appeals of the Fifth Circuit erred in reversing and remanding this cause and in thereby disregarding and overruling the requirements and provisions of Rules 52 and 61 provided for the guidance of such Court.

IV.

The Circuit Court of Appeals for the Fifth Circuit erred in undertaking to draw inferences and deductions from expressions of opinion made by the Trial Court in his oral opinion and before judgment, which were not admitted or declared by said Judge to have influenced or in any manner affected his judgment in said cause.

V.

The Circuit Court of Appeals erred in holding that the market value of the properties involved in said cause, in their opinion, did not amount to $783,907.73, when the Trial Court distinctly found there was no market value for the property, and that his judgment was not based upon market value at all.

VI.

The Circuit Court of Appeals for the Fifth Circuit erred in reversing and remanding this cause based on their finding that the Judge had visited the premises (at the invitation of the Government's Counsel) and that he visited the Commissioners who first valued the premises and property (accompanied by Counsel for the Government), and that he considered, in arriving at his judgment, offers to purchase and offers to sell, when such evidence could have no influence on the judgment of the Court as to any matters in issue, except the land, and in reversing and remanding the entire case as against the judgment of approximately fifteen tenants whose interest therein was only upon crops.

VII.

The Circuit Court of Appeals for the Fifth Circuit erred in reversing and remanding this cause based upon their holding that offers to sell and offers to purchase was incompetent evidence, for the reason that no evidence of offers to sell and offers to purchase, except evidence offered by the Government that was not withdrawn, was before the Court, it having been withdrawn from the consideration of the Court by the Condemnees' attorneys.

VIII.

The Honorable Circuit Court of Appeals erred in not permitting the Trial Court to clarify his opinion and show that he was not influenced by his visit to the premises and his discussion with the Commissioners, and not influenced by any offers to purchase and offers to sell, but that his judgment was based solely upon competent and relevant evidence produced in Court.

IX.

The Honorable Circuit Court of Appeals for the Fifth Circuit erred in holding that they were not willing to admit that $783,907.73 was the market value of all the land, crops and improvements, and covers some fifty or more independent suits, for the reason that the Trial Court specifically held that there was no market value as defined by Statutes for these properties and that the case was tried upon the theory of actual or intrinsic value by both Appellants and Appellees, and the Circuit Court of Appeals did not hold that the Court was in error by conducting said trial upon such grounds or theories.

ARGUMENT

Point I.

The Honorable Circuit Court of Appeals in reversing and remanding this cause in respect to the Court having reviewed the premises shown to him by the Sergeant located on the premises, and in talking to the Commissioners about this matter, erred for the reason that such action on the part of the Court was done at the instance and request and in the presence of the counsel representing the Government. It is a universal rule heretofore recognized by all the courts that one could not take advantage of conduct induced by them, or acts induced by them. And in this instance the action of the Court was directly at the instance and request of Government's Counsel (R. 2195 to 2227). In the case of **Pitcairn,** et al, v. **Fisher,** 78 Federal (2d), 649, the Appellant undertook to complain of the action of the court in considering certain persons as being receivers wihen she herself had nominated and styled them receivers in her pleadings. And in passing on this issue, the Court said: "It is rather obvious that since Appellees repeatedly referred to Appellants as receivers, simply in making this contention, she is guilty of inconsistency and, in effect, breaks down the bridge upon which she must cross. She ought not to be heard to complain of the inexactitude of mere terminology when she herself, in her application for the order, complained of, and, as admitted by her counsel in argument, first brought into thecase the alleged error of which she now complains."

St. Louis B. & M. Ry. Co. vs. Cole, 4th SW(2d) 1019. Laurenson v. Carrell, 289 SW 1024.

In the case of Board of Commissioners of Caddo County vs. United States, 87 Federal (2d), page 55, Justice Bratton for the Circuit Court of Appeals for the 10th District, in discussing the binding effect of the Trial Court's finding of fact, said: "It is an inveterate and unbending rule that a finding made in an action at law in which trial by jury has been waived is conclusive on appeal if it is supporred by substantial evidence."

Point II.

It is an elementary principal of law applicable to the Federal, as well as all State Courts, that in the trial of the cause before the Court, without the intervention of a jury, that upon his judgment will be presumed to have been entered and determined from legal and competent evidence and that he did not consider any illegal, incompetent or irrelevant testimony.

However, in this case, the Circuit Court of Appeals took the opposite view and reversed this case on the theory that notwithstanding the ample, legal testimony upon which to base the verdict as held by Judge Sibley in his dissenting opinion that the Court was influenced, in rendering his judgment, by testimony that had been withdrawn by counsel for the Condemnees, and that he had been influenced by interviews that he had with persons not witnesses in the trial, although such interviews were in the presence of counsel representing the Government who made no complaint about it until after judg-

ment was rendered and appeal perfected. This action on the part of the Circuit Court of Appeals cannot be supported by any authority known to counsel for Petitioners.

In the recent case of the United States vs. 6.87 acres of land in the village of Garden City, reported in the 147th Federal (2d), beginning at page 351, decided by Judge Frank; Judge Frank said in his opinion, referring to the opinion of the lower court and quoting the same: "It is to be noted in this connection that in an opinion denying Appellants' motion for a new trial, 58th Federal Supp., 949, the Trial Court said: "All of the matters referred to in that affidavit were the subject of consideration by me, either specifically or generally, when I wrote my opinion in which I did not accept the valuations of any one of the experts of either party, but arrived at my own opinion after considering the testimony of all of them and viewing the property as therein described." The syllabus of this case the Court says, "In a trial without a jury, it will be presumed, absent a clear showing to the contrary, that the Trial Court relied only on proper evidecne in reaching its conclusion." However, in the case at bar the opposite rule was adopted.

Point III.

Rule 52, provided for the guidance of the Federal Courts, in part, reads as follows:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses." Rule 21 provides: "No

error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the Court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the Court inconsistent with substantial justice. The Court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The Trial Court, in this case, made specific findings as to the actual value of the specific lands owned by the several Condemnees. He made specific findings as to the improvements owned by the several different Condemnees and he made specific findings as to the value of the crops owned by the several Condemnees, and in entering his judgment, he specifically stated that such values were not the market value of such properties as no such evidence of market value existed as would enable him to use it as a guide. And his judgment, as to value, was well within the range of the testimony and was so found by the dissenting opinion of Judge Sibley, yet this Circuit Court of Appeals reversed such judgment.

Point IV.

The Circuit Court of Appeals' judgment is erroneous in that it undertook to draw inferences and conclusions as to the information the Judge obtained which is in no way reflected by the record. Judge McCord, in writing his opinion, used this

language: "We have no way of knowing just how accurate this Police Sergeant was in his explanations to the Trial Judge wherein he pointed out the high and low places in the lands and informed him how such places were made, whether they had been dug or filled in or were natural. Suppose on a rigid cross-examination it was found that the Police Sergeant had made a mistake in some of his findings; just what effect would it have had on the finding and decree of the Trial Judge? We will never know. Were the lands in the same condition as they were when inspected by the witnesses testifying in this case? We will never know. The testimony of the many witnesses as to slopes, grass and lakes and their size and value was possibly sharply contradicted by this Police Sergeant in the information which he gave. It was information obtained completely outside the record and we are not permitted to know what weight it had with the Trial Judge."

The opinion of Judge Wilson who tried the case simply stated that this Sergeant knew what improvements had been placed on the premises and where excavations had been made and it enabled him to know that it was before such improvements, level land. And in addition to this matter, Government Counsel was present with him and it would be a more reasonable presumption to indulge in that such information was favorable to the Government, or the attorney representing the Government would have objected and would have cross-examined the Sergeant. Petitioners' attorneys herein were not

even present, and this conjecture and suggestion by the Circuit Court of Appeals does not have any basis in the opinion of the Court on which it was predicated.

Point V.

There was ample testimony in the Record to show the value of the property involved in this litigation to be far in excess of $783,907.73. The testimony would have warranted the Court in finding that the value of the property covered under this judgment was $801,085.35, while the judgment they actually obtained covering the Petitioners herein was only $635,239.58. A complete tabulation of the testimony of the witnesses as to each specific tarct is shown in Appellees Brief filed in the Circuit Court of Appeals, beginning at page 1A as an Appendix, and continuing to Page 41A, and a comparison is made as to each tract as to the estimate of value placed thereon, and in no instance did the Court render judgments for any of said Condemnees for the maximum amount the evidence would have warranted.

Point VI.

The Circuit Court of Appeals, in reversing and remanding this cause and directing its retrial, did so without any consideration of the rights of the Petitioners herein who were awarded judgments merely for crops. There is no scintilla of evidence in the record that the Court, by seeing the premises or by discussing with the Commissioners, or in any manner outside of the Courtroom, acquired any information as to the value of the crops,

which could have had any influence upon his judgment, but it is apparent from the record, definitely and certain, that when he had information as to the figures used by the Commissioners, that he definitely discarded them and refused to consider them in any way. (See Record 2229) wherein the Court said: "I asked the Commissioners what method they used in arriving at the values and found that they did not use the proper method." The Court then follows by a explanation of the errors they made which were discarded as a basis of his judgment.

Point VII.

The Honorable Circuit Court of Appeals erred in reversing and remanding this cause based upon their conclusions that the Trial Court had based his opinion in part upon offers to sell and offers to purchase, for the reason that there was no such evidence before the Court for his consideration except in two or three instances. The Government's Counsel, on cross-examination, elicited from the Appellees' witnesses, information that they had previously been offered certain prices for their lands. This evidence was not striken from the record but left in the record by the Governmen's Counsel. At page 2110 of the Record, the Condemnees' attorney, in open Court, and with the permission of the Trial Court, specifically withdrew from the consideration of the Court, all evidence that had been introduced relative to offers to buy and offers to sell and listings, leaving the record entirely without any evidence of offers to buy and

offers to sell, which would be considered by the Court. If, by any theory, the Appellate Court was correct in reversing the case of two or three Condemnees because the Government's attorney had elicited from the witnesses on cross-examination certain evidence relative to offers to buy and offers to sell, surely they are in gross error by reversing approximately forty-eight additional, separate and distinct suits wherein no such evidence was left for the consideration of the Court.

Point VIII.

The Honorable Circuit Court of Appeals erred in not granting Petitioners Application to Recall the Mandate, Correct the Record of the Lower Court, and permit the Filing of a Second Motion for Rehearing, because such is contrary to Federal Rule No. 75, Section H. The Appellees' Attorneys having been advised subsquent to the Appellate Court's Order overruling motion for rehearing that the purpose of the Trial Court in visiting the Commissioners was done so for the sole purpose of ascertaining whether or not they had completed their duties and had rendered a full and complete finding as to the values of the lands, improvements and crops and damages, and for no other purpose, the Court having in mind that if the Commissioners had not completed their labors, and determined all issues, that the cause on hearing before him was prematurely brought and that the Commissioners should be required to complete their investigation and report before anyone had a right to appeal therefrom, and have a right for hearing in the Fed-

eral District Court. In addition, if the Appellate Court had permitted the Appellees to correct the record, the basis of conjectures and doubts could have and would have been removed from the minds of that Court, and such is error and prejudicial to the rights of the Appellees because they are left before an Appellate Court without a complete, concise statement by the Trial Court.

And further, that the Court, in going upon the premises to view the same was accompanied by Counsel for the Government, who procured from those in charge of the plant, permission to visit the grounds and procured the services of the Sergeant to accompany them in the viewing of such premises, and was present at all times with the Court and the attorneys made no objection at that time, and made no objection at the time the opinion was rendered.

CONCLUSION

It is respectfully submitted by reason of the importance of the questions involving whether or not the Trial Court can be reversed by the Higher Court upon his finding of fact clearly within the range of the evidence because improper evidence was submitted in the trial of the case and subsequentyl withdrawn, and whether his viewing the premises at the instance of the litigants seeking to reverse his decree, and interviewing the Commissioners with the counsel for the Government present, such holding by said Court be irreconcilable conflict with the rulings of this Honorable Court and numerous other Circuit Courts of Ap-

peals, and the Federal Rules adopted by this Honorable Court certainly is of sufficient importance that this Honorable Court, should exercise its jurisdiction and grant a writ of certiorari in this cause to the United States Circuit Court of Appeals for the Fifth Circuit to review the judgment of said Court entered on the 28th day of December, 1944, and certainly, that on such review the judgment of said Court should be reversed and the judgment of the United States District Court for the Northern District of Texas be affirmed.

Respectfully submitted,

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